In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 41

HARRY B. GREENE AND GLENN I. TONEY, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) is reported at 94 F. Supp. 666.

JURISDICTION

The judgment of the Court of Claims was entered on January 9, 1951 (R. 18). Petitioners' motion for a new trial was overruled on March 6, 1951 (R. 18). The petition for a writ of certiorari was filed

on May 1, 1951. The jurisdiction of this Court is invoked under 12 U. S. C. 1255(1).

QUESTION PRESENTED

Whether border patrol inspectors of the Immigration and Naturalization Service are entitled to recover from the United States the extra compensation for Sunday and holiday work provided for in Sections 1 and 2 of the Act of March 2, 1931, as amended, 46 Stat. 1467, 8 U. S. C. 109a, 109b, where the work was not performed "at designated ports of entry" and was not "in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land or air."

STATUTE INVOLVED

Sections 1 and 2 of the Act of March 2, 1931, as amended, 46 Stat. 1467, 8 U. S. C. 109a, 109b, provide as follows:

> Sec. 1.
>
> The Attorney General shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration and Naturalization Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other

vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Attorney General is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed.

Sec. 2.

The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving in the United States from a foreign port to the Attorney General, who shall pay the same to the several immigration officers and employees entitled thereto as provided in this Act. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual inspection or examination of passengers or crew takes place

or not: *Provided,* That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules.

STATEMENT

Petitioners brought suit in the Court of Claims to recover extra compensation under the Act of March 2, 1931, *supra,* for services performed by them on Sundays and holidays as border patrol inspectors of the Immigration and Naturalization Service. The material facts, as found by the Court of Claims, are substantially as follows:

Under the immigration laws, aliens are forbidden to enter the United States except at ports of entry designated by the Commissioner of Immigration and Naturalization (Fdng. 2, R. 8). At the designated ports of entry, immigration inspectors, or other employees who have been assigned to act as immigration inspectors, are the only employees of the Immigration and Naturalization Service who perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes and other vehicles arriving in the United States from a foreign country by either land, water or air (Fdng. 10, R. 12; see also Section 16 of the Act of February 5, 1917, 39 Stat. 885, 8 U. S. C. 152). It is the responsibility

of the immigration inspector to examine persons seeking entry into the United States in order to determine whether they are citizens or aliens entitled to enter the United States, and if aliens, whether there is reason to believe that they fall within one or more of the forty odd exclusionary provisions of the law (Fdng. 6, R. 10).[1]

To prevent aliens from illegally coming into the United States, border patrol inspectors of the Immigration and Naturalization Service are assigned to various points along the international border between designated ports of entry. Members of the border patrol interrogate persons suspected of undertaking illegally to enter the United States, or suspected of having illegally entered, for the purpose of determining whether or not they should be taken into custody and delivered over to immigration officials at a port of entry. For this purpose, the border patrol inspectors are also assigned to routine patrols of airports, back-up stations, railroad stations, lakes, rivers, hotels and rooming houses in the vicinity of the border. (Fdngs. 3, 4, 6, R. 8, 9, 11.)

When a patrol inspector encounters a suspect on his patrol, he questions him to determine whether the suspect is an American citizen. If the patrol inspector is satisfied that the suspect is an Ameri-

[1] In certain circumstances, aliens may be admitted by a Board of Special Inquiry (Fdng. 3, R. 8; see also Sections 16 and 17 of the Act of February 5, 1917, 39 Stat. 885, 887, 8 U. S. C. 152, 153).

can citizen, he is released; however, if the patrol inspector has reason to believe that the suspect is an alien who has illegally entered the country, the suspect is arrested and taken to the Patrol Headquarters where he is fingerprinted and his sworn statement is executed. The suspect is then delivered to an immigration inspector at a port of entry for examination to determine whether or not he is entitled to entry. (Fdng. 5, R. 9.)

Most of the designated ports of entry are open 24 hours a day and the number of immigration inspectors assigned to each port is limited. When immigration inspectors are given special assignments or go on leave, a shortage of inspectors usually exists. To relieve this shortage, the Immigration and Naturalization Service, in 1937, vested the patrol inspectors with the powers of immigration inspectors. However, the work performed by the patrol inspectors as immigration inspectors is arranged so as not to interfere substantially with the performance of their regular duties as patrol inspectors. As shortages occur at the designated ports of entry, the officer-in-charge notifies the Director of the Immigration and Naturalization District, who makes written assignment of patrol inspectors to the port of entry to perform the duties of absent immigration inspectors. (Fdngs. 7, 8, R. 11-12.)

When patrol inspectors are specifically assigned to ports of entry as immigration inspectors and

perform services on Sundays or holidays or work overtime on those days, they receive extra compensation in accordance with the provisions of the Act of March 2, 1931 (Fdng. 9, R. 12). They do not, however, receive extra compensation for the performance of their regular duties as patrol inspectors, and it is for such services that this suit is brought. When not specifically employed as immigration inspectors, patrol inspectors neither admit aliens into the United States nor pass upon the right of aliens to enter the United States (Fdng. 5, R. 9).

On the basis of the foregoing facts, the Court of Claims held that the work performed by petitioners, as patrol inspectors, on Sundays and holidays did not take place at a port of entry nor was it performed in connection with the examination and landing of passengers as required by the Act. It accordingly dismissed the petition.

ARGUMENT

Section 1 of the Act of March 2, 1931, *supra,* provides that extra compensation shall be paid " * * * inspectors and employees of the Immigration and Naturalization Service who may be required to remain on duty * * * on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, * * *." Petitioners here contend

that the Court of Claims erred in holding that border patrol inspectors, in the performance of their regular duties, neither examine and land persons arriving in the United States, nor perform duties "in connection with" such examination and landing. We submit that the decision below is fully in accord with the language of the statute and the congressional intent underlying it.

1. Petitioners first argue that members of the border patrol, as well as immigration inspectors, examine persons seeking to enter the United States. But the act does not provide extra compensation for examination alone; the critical language of the statute is "examination *and landing.*" Admittedly, patrol inspectors make a preliminary examination of persons seeking to enter the United States between ports of entry, but only for the purpose of determining whether the person is an alien. If there is reason to believe that he is, he is then taken before an immigration inspector at a port of entry for examination as to whether he is entitled to be admitted. A member of the border patrol has no power to give an alien permission to enter; the admission of aliens can be effected only at ports of entry—where border patrol inspectors are not stationed—after examination by an immigration inspector, or, in certain cases, by a Board of Special Inquiry. See Sections 16 and 17 of the Act of February 5, 1917, 39 Stat. 885, 887, 8 U.S.C. 152, 153. As the court below succinctly observed

(R. 15), "The examination made by the members of the border patrol is not that examination contemplated by the Act of March 2, 1931. The examination there referred to is the examination at the port of entry to determine whether or not permission to 'land', or to enter, shall be granted."

2. Alternatively, petitioners contend that if their services as patrol inspectors do not fall within the examination contemplated by the Act, nevertheless, they are entitled to the extra pay because such services between ports of entry are performed "in connection with" the work of immigration inspectors at the port of entry. But here also, petitioners ignore the pertinent language of the statute which provides such extra compensation only for duties performed at the port of entry.

a. Section 1 declares that extra compensation shall be paid to those who "perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air." Since steamships, trains, airplanes, and other vehicles are required to arrive in the United States at a port of entry and are not permitted to discharge their passengers at places other than a port of entry,[2] it follows that Congress has authorized this

[2] See Section 10 of the Act of February 5, 1917, 39 Stat. 881, 8 U.S.C. 146; Section 7(d) of the Act of May 20, 1926, 44 Stat. 572, 49 U.S.C. 177(d); 8 C.F.R. 110.1, 110.3.

extra compensation only for those employed at a port of entry. This conclusion is substantiated by the remaining provisions of the Act. Thus, Section 1 states that "in those ports" where the customary working hours differ from those specified in the act, the Attorney General is authorized to fix comparable working hours "in said ports"—a provision clearly inapplicable to border patrol inspectors who are employed between ports of entry. Section 2 directs that reimbursement for the extra compensation for Sunday or holiday service shall be made "by the master, owner, agent, or consignee of such vessel or other conveyances arriving in the United States from a foreign port." As noted above, these vessels or other conveyances can discharge passengers only at ports of entry. And, lastly, Section 2 exempts from such reimbursement to the Government "*the inspection at designated ports of entry* of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules." Those provisions make it plain that Congress provided for such extra compensation only where immigration inspectors and other employees perform their services at ports of entry. Since members of the border patrol do not work at ports of entry, the duties they perform do not, therefore, come within the purview of the act.

b. Further, Congressional intent to grant such compensation for Sunday or holiday work solely to immigration inspectors or other employees at ports of entry is demonstrated not only by the provisions of the act but by its legislative history as well. The pertinent legislative materials reveal quite clearly that the statutory authorization for the "examination and landing" of passengers at hours other than between 8:00 a.m. and 5:00 p.m., or on Sundays or holidays, is a provision for the convenience of the owner of the vessel or other conveyance arriving at such times at a port of entry. To avoid delay in the landing of passengers and their baggage, the transportation companies were entirely willing to pay for the extra service required by them at the port of entry. Accordingly, Congress provided that those employed at ports of entry be paid extra compensation for services performed outside of the normal tour of duty for the benefit of the transportation companies, and that reimbursement be made to the Government by those companies. See H. Rept. 1214, 71st Cong., 2d Sess.; S. Rept. 1720, 71st Cong., 3d Sess.; 72 Cong. Rec. 10321, 10907-8.[3] Since border patrol inspectors are employed between ports of entry and their services are not required for the examination and

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[3] Firm corroboration of this Congressional purpose is found in the legislative history of the earlier enactments, from which the act here in issue was copied, providing such extra compensation for customs inspectors. See *United States* v. *Myers*, 320 U.S. 561, 566.

landing of passengers carried by steamships, trains, airplanes, or other vehicles which can legally arrive in the United States only at ports of entry, there can be little doubt that Congress did not intend to cover such employees within the benefits of the act.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1951.

[4] In this connection it should be pointed out that petitioner's position is not well taken that, under the decision below, they are the only group of federal employees required to work regularly on Sundays and holidays without premium pay. (Pet. 5-6). To begin with, it has long been recognized that, in the enactment of extra pay legislation for federal employees, discrimination between groups of employees has been the rule rather than the exception. See *United States* v. *Townsley*, 323 U.S. 557. Secondly, the act here in issue necessarily involves discrimination between different employees of the Immigration and Naturalization Service. For example, employees who are employed on departure control inspection, or as hearing officers in deportation cases, or as security officers are clearly excluded from the scope of the act which is concerned solely with the examination and landing of passengers. Finally, under the Federal Employees Pay Act of 1945, 59 Stat. 295, 5 U.S.C. 901, which is applicable to most federal employees, no provision is made for premium pay for Sunday work performed as part of a regular tour of duty.

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